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No. 76-1351

In the Supreme Court of the United States

OCTOBER TERM, 1976

W. W. WINDLE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
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The question presented in this income tax case is whether the court of appeals correctly dismissed petitioner's appeal from a Tax Court decision on the ground that the decision of the Tax Court was in petitioner's favor. In so holding, the court of appeals relied in part on *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242, in which this Court held that "[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."

The pertinent facts are as follows: The proceeding in the Tax Court involved petitioner's income tax liability for its taxable year ending June 30, 1970 (Pet. App. 1, 22). On its 1970 tax return, petitioner reported that it had incurred a net loss in that year of $397,769.48, and

that it consequently owed no income tax for that year. On audit, the Commissioner of Internal Revenue determined that petitioner's correct taxable income for that period was $284,264.76 and accordingly determined a $139,114.17 deficiency (Pet. App. 1, 24).

The basis of the Commissioner's determination was the disallowance of two deductions against ordinary income claimed by petitioner: (1) a $317,000.60 bad debt deduction for various loans and other amounts that petitioner had advanced on account to Nor-West Fabrics, Inc. ("Nor-West"); and (2) a $360,000 "loss" deduction that petitioner claimed in 1970 when the stock it held in Nor-West became worthless (Pet. App. 1, 10, 23-24). The Commissioner concluded that petitioner's loans to Nor-West were actually an equity investment and, as such, were subject to the capital loss limitation of Section 1211 of the Code (26 U.S.C.).[1] The Commissioner also determined that petitioner's loss on its Nor-West stock was a capital rather than an ordinary loss, which was likewise subject to the limitations of Section 1211 (Pet. App. 2425).

Petitioner filed a petition in the Tax Court for a redetermination of the deficiency. In its opinion, the Tax Court upheld the Commissioner's determination that petitioner's loss on its Nor-West stock was a capital loss, but held that petitioner was entitled to claim a bad debt deduction against ordinary income for the full amount of $317,000.60 it had advanced to Nor-West (Pet. App. 10-21). Since the $317,000.60 bad debt deduction was greater than petitioner's taxable income of $284,264.76 determined by

[1]The capital losses incurred by a corporation, such as petitioner, are not deductible in full. Instead, Section 1211(a) of the Code provides that "[i]n the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges."

the Commissioner, the Tax Court entered a decision that "there is no deficiency in income tax due from, or overpayment due to, the petitioner for the taxable year ended June 30, 1970" (Pet. App. 28 n. 4).

The Commissioner did not appeal from the Tax Court's decision that there was no deficiency in petitioner's 1970 tax (Pet. App. 24). Petitioner, however, sought to appeal from this decision in its favor in order to challenge that part of the Tax Court's opinion dealing with petitioner's loss on its Nor-West stock (Pet. App. 22-27). The court of appeals dismissed petitioner's appeal for lack of jurisdiction. It pointed out that there was no longer any controversy over the fact that petitioner owed no income tax for its 1970 tax year (Pet. App. 25-27, 28).

1. The court of appeals correctly held that it had no jurisdiction to consider petitioner's appeal. It is well settled that a successful party may not appeal from a decision in its favor in order to challenge a finding or ruling that is not material to the judgment below. *Electrical Fittings Corp.* v. *Thomas & Betts Co., supra,* 307 U.S. at 242; *Pub. Serv. Comm'n* v. *Brashear Lines,* 306 U.S. 204, 206-207; *Lindheimer* v. *Illinois Tel. Co.,* 292 U.S. 151, 176.[2] The Tax Court's function and jurisdiction in this case, as defined in Sections 6213(a) and 6214(a) of the Code, was to "redetermine the correct amount of the deficiency" in petitioner's 1970 tax. See *Burns, Stix Friedman & Co.* v.

[2]Contrary to petitioner's argument (Pet. 7-11), *Altvater* v. *Freeman,* 319 U.S. 359, does not qualify that fundamental proposition. There, this Court held that a defendant, otherwise successful, could appeal from the dismissal of his counterclaim. But the counterclaim in that case was a separate cause of action and its dismissal was adverse to the defendant. Here, however, petitioner was completely successful in the Tax Court for it obtained there all the relief that was within that court's jurisdiction to award. See *United States ex rel. Girard Co.* v. *Helvering,* 301 U.S. 540, 542.

Commissioner, 57 T.C. 392, 396. Since the Tax Court's decision was that there was no deficiency in petitioner's tax for that year, petitioner was completely successful before that court and therefore could not appeal from the decision in its favor. As the court of appeals correctly observed, "when the decision was entered and it was favorable to the taxpayer [petitioner] the controversy about the amount of taxes due ended" (Pet. App. 26).

2. The correctness of the decision below is further demonstrated by the jurisdictional limitations set forth in Section 7482(a) of the Code on the courts of appeals' power to review Tax Court "decisions." Under that provision, the courts of appeals have only "jurisdiction to review the *decisions* of the Tax Court" (emphasis added). The decision specifies the amount, if any, of the deficiency. See Section 7459(c); cf. *Commissioner* v. *Smith Paper*, 222 F. 2d 126 (C.A. 1). According to Section 7482(c), "[u]pon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require."

As the court below noted (Pet. App. 22), however, "Windle's quarrel is not with the decision, which was favorable to it." Petitioner, instead, was asking the court of appeals to enter an advisory opinion on the proper tax treatment of petitioner's loss from its Nor-West stock, which the court of appeals had no power to do. See *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716. Indeed, even if the court of appeals had agreed with petitioner on the merits, it could have done nothing more than affirm the decision in petitioner's favor from which petitioner was attempting to appeal. Under these circumstances, any judgment by the court of appeals on the stock loss issue would have been beyond its jurisdiction under Section 7482 (a) and (c).

Petitioner acknowledges (Pet. 6, 10) that the ruling by the court of appeals on the stock loss issue would have no effect on its tax liability for 1970, the only year in issue before the Tax Court and the court of appeals. However, it suggests (*ibid.*) that had it prevailed on the stock loss question, it would have been entitled to larger net operating loss carryovers, which would reduce its tax liability for other years not in issue. But as this Court has pointed out when dealing with the cognate provisions of the Internal Revenue Code of 1939, the Tax Court (and therefore the court of appeals) has no jurisdiction under Section 6214(b) of the Code (26 U.S.C.) to determine a taxpayer's tax liability for any year other than the year in issue. *Commissioner* v. *Gooch Co.*, 320 U.S. 418. See, *e.g.*, *LTV Corp.* v. *Commissioner*, 64 T.C. 589.[3]

3. Finally, petitoner argues (Pet. 11-15) that the decision below conflicts with *Louisville Builders Supply Co.* v. *Commissioner*, 294 F. 2d 333 (C.A. 6). There the court held that it could review a final order which the Tax Court had entered in a special proceeding in order to determine whether the Tax Court had jurisdiction to issue such an order. As the court stated, if there were no appellate review in such a case, the Tax Court would have "extraordinary

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[3]Contrary to petitioner's suggestion (Pet. 8-9) neither the Commissioner nor the court of appeals has ever suggested that the controversy over petitioner's loss on its Nor-West stock is moot. Resolution of that issue will most likely affect petitioner's tax liability for other years, depending on whether petitioner is entitled to ordinary or capital loss treatment. Compare *Atherton Mills* v. *Johnston*, 259 U.S. 13. But as the court of appeals noted (Pet. App. 26-27), "[a]ny conclusion we might now reach on the merits of Windle's claim would be at most a kind of declaratory judgment affording guidance for other years, a type of remedy nowhere sanctioned with respect to Federal taxes, *see* 28 U.S.C. §2201." See also *Bob Jones University* v. *Simon*, 416 U.S. 725, 732-733 n. 7; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 759 n. 10.

and nonreviewable authority" to determine the outer limits of its own jursdiction (294 F. 2d at 338).

Louisville Builders Supply Co. is simply an application of the proposition that an appellate court has jurisdiction to determine whether a lower court had jurisdiction. Indeed, in ordinary cases, the Sixth Circuit has held, in conformity with the decision below and the other courts of appeals, that a "decision" of the Tax Court is limited to a formal determination by the Tax Court that there is or is not a deficiency. *Licavoli* v. *Commissioner*, 318 F. 2d 281, 282 (C.A. 6). Accord: *Porter* v. *Commissioner*, 453 F. 2d 1231 (C.A. 5); *Commissioner* v. *S. Frieder & Sons Co.*, 228 F. 2d 478 (C.A. 3); see also *Commissioner* v. *Smith Paper, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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